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ARTICLE

PIT BULLS: MARYLAND'S *SOLESKY* CASE CHANGES LIABILITY STANDARD

By: Susan Rappaport, Kathleen M. Elmore,
and Megan O'Connor

In 2007, a young Towson, Maryland boy, Dominic Solesky, was violently attacked by a pit bull dog. He barely survived the attack. This pit bull attack ultimately resulted in a massive change to Maryland law with regard to liability in such matters.

On April 26, 2012, the Court of Appeals of Maryland filed an opinion in *Tracey v. Solesky*¹ holding by a four to three vote, that, “upon a plaintiff’s sufficient proof that a dog involved in an attack is a pit bull or pit bull mix, and that the owner, or other person(s) who has the right to control the pit bull’s presence on the subject premises . . . knows, or has reason to know, that the dog is a pit bull or cross-bred pit bull mix, that person is strictly liable for the damages caused to a plaintiff who is attacked by the dog on or from the owner’s or lessor’s premises.”²

A Motion for Reconsideration was filed in the case May 25, 2012, by petitioner, Dorothy Tracey, the landlord of the premises where the dog was kept. On August 21, 2012, the court amended its ruling to delete any reference to cross-breds, pit bull mixes, or cross-bred pit bull mixes.³ The rationale for amending its opinion, as stated by Judge Wilner, was that there was never any assertion, suggestion, or finding in the case that the dog was a cross-breed, and it is unclear what cross-bred means⁴. As such, the ruling is limited to purebred pit bull breeds, *i.e.*, American Pit Bull Terriers, Staffordshire Terriers, American Staffordshire Terriers, and Staffordshire Bull Terriers.⁵ The court, however, did raise the possibility that it could revisit the question if it were presented with a case that involved a mixed-breed pit bull.

This case has serious and far-reaching ramifications for dog owners, landlords, and other third parties such as common interest ownership associations and business owners. Does the court’s imposition of strict liability extending to third parties tread too heavily on the rights and sensibilities of Marylanders, or is this action by the *Solesky* court an appropriate decision justified in the facts for the protection of the public? A

¹ *Tracey v. Solesky*, 427 Md. 627, 50 A.3d 1075 (2012).

² *Id.* at 652, 50 A.3d at 1089.

³ *Id.* at 664, 50 A.3d at 1096.

⁴ *Id.* at 665-66, 50 A.3d at 1097.

⁵ *Id.* at 667, 50 A.3d at 1098.

review of state laws nationwide with regard to strict liability for injury or death caused by dogs reveal that no other state imposes strict liability on third parties. Maryland stands alone in this category and not by an action by its duly elected legislative branch, but by reason of an activist judiciary. The long-standing common law rule embodied by “first bite free” is no longer the law with regard to pit bulls in Maryland. Hundreds of pit bull owners may be forced to abandon their pets in one Baltimore City community alone.⁶ Animal shelters are overrun with pit bulls because owners have no alternative if they do not want to lose their residences.⁷

Imposition of strict liability in dog attack cases, particularly involving pit bulls, is not new in the United States. “Thirty-three states have modified the common law by enacting a statute that imposes strict liability to any dog bite, including a first bite under specified circumstances”⁸ The Court of Appeals of Maryland stepped over the legislature in *Solesky*. Even though it is not common, Maryland is not the first state court to impose strict liability regardless of statutory provisions.⁹

Despite formation of a Maryland legislative Pit Bull Task Force in 2012 to study the issues raised in *Solesky*, the legislature failed to enact any legislation with regard to pit bulls or dog liability standards in the 2012 special sessions, or the 2013 regular session. The Task Force met just before the Maryland special session in the fall of 2012, but failed to pass any legislation at that time. The Task Force reconvened October 25, 2012 and proposed legislation was drafted for consideration during the 2013 regular legislative session, January to April. Several bills were introduced to essentially overturn the *Solesky* decision.¹⁰ The bills ranged from imposing strict liability on only pit bull owners, to imposing strict liability on all dog

⁶ Weigel v. Maryland, No. WDQ-12-2723, 2013 WL 3157517, at *4 (D. Md. June 19, 2013).

⁷ *Id.* at *13.

⁸ DEL. SIMMONS, MD. GEN. ASSEMB. DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE REVISED, H.B. 78, 2013 Sess., at 5 (Md. 2013).

⁹ Griner v. Smith, 259 S.E.2d 383, 387-88 (N.C. Ct. App. 1979).

¹⁰ S.B. 160, 2013 Leg., Reg. Sess. (Md. 2013) (establishing that, in an action against an owner of a dog for damages for personal injury or death caused by the dog, evidence that the dog caused the injury or death creates a rebuttable presumption that the owner knew or should have known that the dog had vicious or dangerous propensities; providing that the presumption may not be rebutted as a matter of law, but that the presumption may be rebutted by specified clear and convincing evidence); H.B. 78, 2013 Leg., Reg. Sess. (Md. 2013) (establishing that, in an action against an owner of a dog for damages for personal injury or death caused by the dog, evidence that the dog caused the injury or death creates a rebuttable presumption that the owner knew or should have known that the dog had vicious or dangerous propensities and that in an action against a person other than an owner of a dog for specified damages, the common law prior to April 1, 2012, is retained as to the person without regard to the breed or heritage of the dog).

owners, no matter the breed.¹¹ All of the bills would have abolished strict liability for third parties. None of the bills passed into law.

Solesky makes it clear that pit bull breeds are considered inherently dangerous but does not prohibit Maryland residents from owning pit bulls. The case establishes for the entire State that harboring (keeping/sheltering) any pit bull will automatically result in liability to the owner, the harboring party, and to any third party that knows or should know of the harboring, if that third party has the right to control the pit bull's presence, or the right or opportunity to prohibit such dogs on the premises.¹²

This automatic or "strict liability" is a monumental and serious change to the standard of negligence applied for pit bull attacks in Maryland. *Solesky* deems pit bulls as inherently dangerous animals.¹³ As such, liability is independent of any fault on the part of the owner.¹⁴ All that needs to occur is that the animal injures someone. If injury occurs, there is automatic liability to the owner, and/or to the person harboring the animal, and to any person or entity that has the right or opportunity to control the pit bull's presence on the premises. Consequently, the exposure to the owners, those who keep the dogs, and to otherwise "innocent" third parties is real and can be extreme in the event of serious injury or the death of an attack victim.

FIRST TEST OF *SOLESKY*

Solesky was promptly tested in *Weigel v. State*, when on September 12, 2012, Joseph Weigel, a member and leaseholder in Armistead Homes Corporation, a Baltimore City cooperative, moved for a temporary restraining order and preliminary injunction to stop enforcement of rule imposed by the cooperative banning pit bull and pit bull crossbreeds from the housing complex.¹⁵ On October 15, 2012, Weigel and other members and leaseholders of the cooperative amended the complaint as a class action suit and ten days thereafter filed a second motion for temporary restraining order and injunction.¹⁶ The rule had been recently implemented to protect the cooperative from liability in pit bull dog attacks that might occur on its premises as a direct result of the ruling in *Solesky*.¹⁷

The court found that the Plaintiffs had standing to assert their claims.¹⁸ State officials were arms of the state entitled to Eleventh Amendment immunity and claims against judges were barred by absolute judicial

¹¹ S.B. 160, 2013 Leg., Reg. Sess. (Md. 2013); H.B. 78, 2013 Leg., Reg. Sess. (Md. 2013).

¹² *Solesky*, 427 Md. at 652, 50 A.3d 1075, 1089.

¹³ *Id.* at 636, 50 A.3d at 1080.

¹⁴ *Id.* at 638, 50 A.3d 1081.

¹⁵ *Weigel*, 2013 WL 3157517, at *1.

¹⁶ *Id.*

¹⁷ *Id.* at *4.

¹⁸ *Id.* at *5.

immunity.¹⁹ The plaintiffs' substantive due process rights were not violated by the ruling in *Solesky* because the right to own and keep dogs was not fundamental, and the state had a legitimate interest in the protection of the public's health and safety.²⁰ Neither the *Solesky* ruling nor the cooperative's rule resulted in a taking.²¹ The State's Motion to Dismiss was granted and all other pending motions were denied as moot.²²

A BRIEF HISTORY AND CURRENT SUMMARY OF DOG BITE CASES IN MARYLAND

While dogs have long been known as man's best friend, they also have a long history of "biting the human hand that feeds them." The issue of owners' liability for the actions of their dog, specifically biting, is not new or novel. In fact, the Court of Appeals of Maryland addressed this issue as early as 1882.²³ There have been many other dog bite cases since then, including a case as early as 1916 regarding an owner's liability for the acts of his pit bull.²⁴ However, until *Solesky*, Maryland courts have applied a two-part test to determine whether dog owners were liable for the damages caused by their dog.²⁵ In addition, pre-*Solesky*, Maryland courts did not employ a breed-specific standard and, therefore, all dog owners were held to the same two-part standard.²⁶

The prior two-part test to determine whether a dog owner was liable for the damage caused by his or her dog provided that an owner could not be held liable for the injuries "unless it could be shown that the dog had a vicious propensity, and that such a vicious propensity or inclination was known to its owner."²⁷ Other jurisdictions have adopted a similar standard, calling it the "one bite rule," meaning that owners were not liable for the actions of their dog until they had knowledge that the dog had bitten one

¹⁹ *Id.* at *29-31.

²⁰ *Weigel*, 2013 WL 3157517, at *14.

²¹ *Id.* at *15-16.

²² *Id.* at *17.

²³ *Goode v. Martin*, 57 Md. 606, 607; 40 Am.Rep 448 (1882) (discussing whether Defendant was liable to Plaintiff for injuries sustained by Plaintiff's son through a dog bite by Defendant's dog) modified by *Solesky*, 427 Md. at 627, 50 A.3d at 1075.

²⁴ *Bachman v. Clark*, 128 Md. 245, 97 A. 440 (1916).

²⁵ *Id.* at 247, 97 A. at 441.

²⁶ *McDonald v. Burgess*, 254 Md. 452, 459-60, 255 A.2d 299, 303 (1969) (citing *Twigg v. Ryland*, 62 Md. 380 (1884)).

²⁷ *Bachman*, 128 Md. at 248, 97 A. at 441, modified by *Solesky*, 427 Md. at 627, 50 A.3d at 1075. See also *Shields v. Wagman* 350 Md. 666, 686-87, 714 A.2d 881, 890-91 (1998) modified by *Solesky*, 427 Md. at 627, 50 A.3d at 1075; *Bramble v. Thompson*, 264 Md. 518, 522, 287 A.2d 265, 268 (1972); *McDonald*, 254 at 456-57, 255 A.2d at 301 (citing *Twigg*, 62 Md. 380).

person,²⁸ and Maryland subscribes to this rule as well. However, the Court of Appeals of Maryland also found on several occasions that a previous bite by the dog was not required, and further that the “owner’s knowledge of the dog’s vicious propensity need only be such as to put him on his guard, and to require him as an ordinary prudent person to anticipate the act or conduct of the dog resulting in the injury for which the owner is sought to be held liable.”²⁹

Solesky changed the long-standing history in Maryland of dog bite common law, particularly for the breed of dog known as the pit bull terrier. Essentially, a strict liability standard will be applied in any case involving the liability of an owner for damages inflicted by his or her pit bull. Therefore, owners who know, or should know, that their dog is a pit bull will be automatically liable for any harm the dog may inflict, even if the specific animal in question has no history of being aggressive, attacking, or biting.³⁰

THE STRICT LIABILITY STANDARD AND ITS APPLICATION IN MARYLAND

In the past, Maryland courts have only applied a strict liability standard, in specific and infrequent instances. These instances include abnormally dangerous substances, products liability, and select cases involving the behavior of animals.³¹

The current version of the Maryland strict liability doctrine for abnormally dangerous substances was set out in *Yommer v. McKenzie*.³² The Court of Appeals of Maryland adopted the test set out by the Restatement (Second) of Torts Section 519 test that a person “who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost of care to prevent the harm.”³³ This means that even if a person has taken all of the necessary and prudent precautions against the potential harm to another, he or she is still held liable for any damage caused by that substance to another. The court has since limited strict liability in

²⁸ Question: “Which Are the One Bite States?” DogBiteLaw.com, <http://dogbitelaw.com/faq/which-are-the-one-bite-states.html> (last visited Sept. 16, 2013).

²⁹ *Bachman*, 128 Md. at 248, 97 A. at 441, modified by *Solesky*, 427 Md. at 627, 50 A.3d at 1075. See also *Shields*, 350 Md. at 686, 714 A.2d at 891, modified by *Solesky*, 427 Md. at 627, 50 A.3d at 1075.

³⁰ *Solesky*, 427 Md. at 652, 50 A.3d at 1089.

³¹ See, e.g., *Yommer v. McKenzie*, 255 Md. 220, 222-23, 257 A.2d 138, 139 (1969) (regarding abnormally dangerous activities); *Phipps v. General Motors Corp.*, 278 Md. 337, 343-44, 363 A.2d 955, 958 (1976) (addressing products liability); *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 356, 517 A.2d 1122, 1129 (Md. Ct. Spec. App. 1986) (considering domestic animal behavior).

³² *Yommer*, 255 Md. at 222-27, 257 A.2d at 139-41.

³³ RESTATEMENT (SECOND) OF TORTS § 519 (1977).

these types of cases to claims brought by an occupier of land, who is harmed by a nearby abnormally dangerous activity, which is the product of a contemporaneous occupier of neighboring land.³⁴

Maryland courts established a strict liability standard for products liability cases in *Phipps v. General Motors Corporation*.³⁵ *Phipps* adopted the theory of strict liability as provided in the Restatement (Second) of Torts Section 402A which states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.³⁶

The rationale supporting employing a strict liability standard for products liability is that “public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.”³⁷ The producer of a product is the most able to reduce these risks and, therefore, should be strictly liable for any defects present in the product that cause harm to another person even if there is no negligence on his behalf.³⁸ In order to prove liability under this strict liability standard, a plaintiff must show that:

1. The product was in defective condition at the time it left the control or possession of the seller.
2. The product was unreasonably dangerous to the user or consumer.

³⁴ *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 133, 497 A.2d 1143, 1147 (1985).

³⁵ *Phipps*, 278 Md. at 363 A.2d at 963.

³⁶ *Id.* at 340-41, 363 A.2d at 957 (citing RESTATEMENT (SECOND) OF TORTS § 402 (1965)).

³⁷ RICHARD J. GILBERT & PAUL T. GILBERT, MARYLAND TORT LAW HANDBOOK § 12.1 (3d ed. 2000).

³⁸ RICHARD J. GILBERT & PAUL T. GILBERT, MARYLAND TORT LAW HANDBOOK § 12.1 (3d ed. 2000). *See also Phipps*, 278 Md. at 352-53, 363 A.2d at 963.

3. The defect in the product caused the plaintiff's injuries.
4. The product was expected to and did reach the consumer without substantial change in its condition.³⁹

There have also been isolated cases in which strict liability has been applied to animal owners.⁴⁰ These cases have dealt with a variety of animals from horses to dogs. In each of these cases prior to *Solesky*, Maryland courts have held that the owner may only be held strictly liable if a plaintiff can demonstrate the owner knew or should have known the animal had a propensity to commit the particular type of behavior that caused the harm.⁴¹ Each of these cases addressed the specific animal in question and not the type, family, or breed of animal.

The three somewhat narrow circumstances under which the strict liability standard has been applied have all been based on broad and far reaching public policy considerations. Application of the strict liability standard in each of these three circumstances is based on a specific, objective, and easily determinable standard. It is certainly important that individuals dealing with substances that could potentially harm large numbers of people, as well as natural resources, undertake the handling of these substances with care. Similarly, society wants to ensure that each product available for mass distribution to the general public is as safe as possible. Finally, individuals who own and care for animals that have a history of harming others should have an incentive to ensure that the animal is properly restrained and that the appropriate precautions are taken before allowing others to come into contact with the animal. Enforcing a strict liability standard is beneficial for society in each of these circumstances. The standard provides an incentive for citizens to act in a safe, prudent, and responsible matter, taking the care necessary to protect others. Conversely, the standard set out for pit bulls in *Solesky* is not beneficial for society and is not an easily delineated standard.

The ruling in *Solesky* creates problems, rather than solving them for Maryland citizens and businesses. The new standard is costly, difficult to apply, and a waste of societal resources without accomplishing its desired purpose of increased safety for potential dog bite victims.

A. The New Standard is Not Cost Effective for Dog or Business Owners

The ruling in *Solesky* has caused, and will continue to cause, landlords, property management companies, and other business owners who have the

³⁹ *Phipps*, 278 Md. at 344, 363 A.2d at 958.

⁴⁰ *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342, 356 517 A.2d 1122, 1129 (Md. Ct. Spec. App. 1986); see also *Finneran v. Wood*, 249 Md. 643, 647-48, 241 A.2d 579, 581 (Md. 1968); *Herbert v. Ziegler*, 216 Md. 212, 216, 139 A.2d 699, 702 (Md. 1958); *Twigg*, 62 Md. 380, 385.

⁴¹ *Id.*

right to control the presence of pit bulls on their property to incur additional expenses in the form of insurance or other costly interventions to ensure that they are protected from these new liabilities.⁴² There is concern that due to unreliable information regarding isolated dog bite incidents and breed-specific laws and legislation, insurance companies will refuse to provide a policy that covers dogs of certain breeds, or only provide this coverage at very high premiums, thereby further exacerbating the problem.⁴³ Now that landlords and other similar business owners are held responsible for the damages done by a pit bull on their property, even if a particular dog has no history of aggressive behavior, landlords are reluctant to rent or continue renting to individuals owning a pit bull.⁴⁴ Many pit bull owners are faced with the unpleasant choice of giving up a beloved family pet or being evicted and finding another, often more expensive, place to live. These increased costs hurt not only pet owners, but the local economy as well, because some of these displaced individuals will look for other communities in neighboring states to relocate to in order to avoid the increased liability.

Condominiums, cooperatives and homeowner associations all have the right to control the presence of pit bulls on commonly owned property and, therefore, under *Solesky*, common ownership communities can be held strictly liable for damage or injury caused by a pit bull on their property.⁴⁵ To avoid this liability, prudent common ownership communities enact rules prohibiting the presence of vicious animals such as pit bulls on common property or, in the very least, are enacting strict rules governing the conduct of pit bulls and their owners while on common property.⁴⁶ For condominiums and cooperatives the problem is further exacerbated in that the Boards of Directors of such communities have broad rule-making authority and, thus, the ability to control all of the property comprising the condominium or cooperative, and not just the common areas. Consequently, condominiums and cooperatives can be held strictly liable for injuries inflicted by purebred pit bulls anywhere within the condominium or cooperative, including within the individual units. To avoid this potential liability, many condominiums and cooperatives are banning pit bulls from

⁴² Jessica Anderson, *Fallout from Pit Bull Ruling Concerns Rise Among Dog Owners, Property Owners: Animal Advocates Say Breed-Specific Ruling is Unfair*, BALT. SUN (May 2, 2012), http://articles.baltimoresun.com/2012-05-02/news/bs-md-pit-bull-response-20120501_1_pit-bull-dog-owners-baltimore-humane-society.

⁴³ Pat Miller, *Tracey v. Solesky; Society v. Pitbulls*, WholeDogJournal.com (Apr. 30, 2012), <http://www.whole-dog-journal.com/blog/Pitbulls-Deemed-Dangerous-Tracey-v-Solesky-Court-Case-20529-1.html>.

⁴⁴ Christian Schaffer, *Federal Judge Upholds MD Pit Bull Law*, ABC2News.com, (July 15, 2013), <http://www.abc2news.com/dpp/news/state/federal-judge-upholds-md-pit-bull-law>.

⁴⁵ *Solesky*, 427 Md. at 635, 50 A.3d at 1079.

⁴⁶ Angela S. Robinson, *Pets & Community*, 40 MD. BAR J. 28 (2007).

their communities.⁴⁷ Therefore, in addition to the impact on the rental market, the ruling in *Solesky*, is also creating unintended negative consequences in the Maryland real estate market.

Other types of businesses, including pet services or even pet friendly businesses are, or will be, adversely affected by this change in the law. Veterinarians, animal hospitals, groomers, and other businesses that service dogs will also need to attempt to obtain increased liability insurance when caring for pit bulls. They may also incur increased costs by rising insurance rates and attempts to have testing in place to try and determine which dogs are in fact “pure breed pit bulls.”⁴⁸ In addition to businesses that cater specifically to dogs, other business that have been dog friendly in the past, such as certain hotels and motels, may have to reevaluate their pet friendly policies and potentially exclude dogs which, in turn, will alienate some of their customer base. These businesses make up a significant subsection of the business market in Maryland, particularly the small business market, which will surely be negatively impacted by this change in the law.⁴⁹

Finally, the largest increase in cost will likely fall on those cities, municipalities, and local communities who inevitably bear the burden of dealing with the large numbers of dogs that are abandoned or surrendered in response to this new law.⁵⁰ Many dog owners may not have the financial means to keep their dog when it requires paying additional insurance premiums, or moving out of their current residence to a place that will accommodate their pit bull.⁵¹ For these pet owners, the only remaining option may either be to surrender their pit bulls to local shelters or to abandon them. This will increase the cost of running the local shelters and humane societies as well as local departments of animal control.

Clearly the increase in cost alone for local business owners, landlords, citizens, and communities is insufficient justification to abandon the new liability standard set forth in *Solesky*. The Maryland legislature should recognize the *Solesky* decision’s unintended negative economic effects and enact legislation to address these problems.

⁴⁷ *Solesky*, 427 Md. at 635, 50 A.3d at 1079.

⁴⁸ Lisa LaFontaine, *Dog Breed Legislation Is Inherently Dangerous*, THE HUFFINGTON POST (May 30, 2012, 2:23pm), http://www.huffingtonpost.com/lisa-lafontaine/dog-breed-discrimination-_b_1554090.html.

⁴⁹ BringFido, <http://www.bringfido.com/restaurant/state/maryland/>, (last visited on Sept. 17, 2013).

⁵⁰ Lisa LaFontaine, *Dog Breed Legislation is Inherently Dangerous, DC Impact*, THE HUFFINGTON POST (May 30, 2012, 2:23 PM), http://huffingtonpost.com/lisa-lafontaine/dog-breed-discrimination-_b_1554090.html.

⁵¹ Michael Dresser, *Pit Bull Compromise Unravels: Montgomery County Democrats at Odds Over Amendment, Maryland*, THE BALTIMORE SUN (March 8, 2013, 8:26 PM), <http://www.baltimoresun.com/news/maryland/bs-md-pit-bulls-breakdown-20130308,0,3264255.story>.

B. The New Standard is Difficult to Apply

The new strict liability standard imposed by *Solesky* is impracticable as it is potentially impossible to identify which dogs are covered by the new rule. In its revised opinion of *Solesky*, the Court of Appeals of Maryland attempted to solve this problem by removing any reference to cross-bred pit bulls and holding that only purebred pit bulls are deemed inherently dangerous animals.⁵² However, veterinarians and dog breeders have advised that there is no such thing as a purebred pit bull, and that the term “pit bull” is used to describe a group of dogs sharing similar characteristics.

In certain circumstances, DNA testing for dogs is unreliable in determining the exact breed. In addition to the expense of the testing (typically a minimum cost of at least \$60.00)⁵³ the tests are unable, by their own admission, to test for “pure breed pit bulls.” The website for a widely used, commercially sold DNA test kit called “Wisdom Panel” has the following disclaimer regarding pit bull testing:

Does Wisdom Panel® test for “Pit-bull”?

“The term "Pit-bull" is a bit of a misnomer and does not refer to a single, recognized breed of dog, but rather to a genetically diverse group of breeds which are associated by certain physical traits. Pit-bull type dogs have historically been bred by combining guarding type breeds with terriers for certain desired characteristics – and as such they may retain many genetic similarities to the likely progenitor breeds and other closely related breeds.

Due to the genetic diversity of this group, Mars Veterinary™ cannot build a DNA profile to genetically identify every dog that may be visually classified as a Pit-bull. When these types of dogs are tested with the Wisdom Panel®, we routinely detect various quantities of the component purebred dogs including the American Staffordshire terrier, Boston terrier, Bull terrier, Staffordshire Bull terrier, Mastiff, Bullmastiff, Boxer, Bulldog, and various other terriers. Additionally, there are often other breeds outside of the

⁵² *Solesky*, 427 Md. at 664, 50 A.3d at 1097.

⁵³ Edie Lau, *Dog Breed Genetic Tests Put to the Test*, THE VIN NEWS SERVICE (July 10, 2012), <http://news.vin.com/doc/?id=5450068>.

guard and terrier groups identified in the mix depending on each dog's individual ancestry.⁵⁴

"Happy Dog DNA", which promotes Wisdom Panel, lists the following disclaimer on its website:

It is understood that no analytical test is 100% accurate. If a breed is present in your dog that is in the database of [sixty-three] validated breeds, it should be detected. However, if DNA is found from a breed that is not in the database, it will be assigned to the most closely related breed, or to breeds that are further back in your dog's ancestry.⁵⁵

It is clear that the DNA tests available for dog breed purposes are far from perfect. The fact that these tests are unable to prove with certainty whether a dog is a specific breed or not is further evidence of the difficulties that dog owners and business owners alike will have in determining whether a dog is, in fact, a pure breed pit bull and, therefore, subject to this new standard. Furthermore, this standard will also be difficult to implement because some, including insurance companies, will consider any dog that has some of the common characteristics of a pit bull to be a pit bull. This confusion may cause a much larger population of dog owners to be adversely affected than would be if there was an effective way to determine pure breed pit bulls.

Because this standard cannot possibly be effectively implemented, the legislature should work quickly to change the standard implemented by *Solesky*.

STRICT LIABILITY AND ITS EFFECT ON CONTRIBUTORY NEGLIGENCE IN MARYLAND

This *Solesky* standard is particularly harsh toward all affected groups when viewed in light of Maryland's contributory negligence standard. Maryland is one of only a few states that still utilize a contributory negligence standard, rather than the more widely used comparative negligence standard.⁵⁶ Contributory negligence "occurs whenever the injured person acts or fails to act in a manner consistent with the knowledge or appreciation, actual or implied, of the danger or injury that his or her

⁵⁴ Wisdom Panel FAQs: Questions About Breeds, WisdomPanel.com (follow "FAQ" hyperlink, then scroll down to "Questions About Breeds" and click "Does Wisdom Panel® test for 'pit-bull'?").

⁵⁵ Happy Dog DNA FAQ, HappyDogDNA.com (scroll down to "How accurate is this test?").

⁵⁶ RICHARD J. GILBERT & PAUL T. GILBERT, MARYLAND TORT LAW HANDBOOK § 11.4 (3d ed. 2012).

conduct involves.”⁵⁷ Although a defendant may be found to have been negligent, and it can be shown that his negligence was a major cause of the plaintiff’s injuries, the plaintiff is barred from recovery if he contributed, in any way, to the happening of the incident.⁵⁸ This means that in most cases, if the plaintiff was doing something that placed himself in harm’s way when he was injured, he will be unable to recover any damages.⁵⁹

In products liability cases, however, the court has traditionally held that a contributory negligence defense does not bar strict liability.⁶⁰ Although a case involving pit bulls, strict liability and contributory negligence has not yet arisen, it is likely, based upon previous case law, that contributory negligence would not bar the strict liability associated with pit bull ownership. Therefore, if a person was attacked by a pit bull due to his own negligence, such as provoking the dog, attempting to harm the dog or its owner, or any other unreasonable or irrational behavior that caused the dog to attack, the owner would be unable to claim a defense of contributory negligence. This makes the new strict liability standard even harsher toward pit bull owners, landlords, and other parties, who could potentially be sued under the *Solesky* standard. The former two-part test was considered a negligence standard where, presumably, contributory negligence would have been a valid defense if the person bringing the lawsuit had somehow provoked or initiated the attack that caused their injuries or damages. This, among all of the reasons mentioned above, is why the legislature should change the standard back to a negligence standard.

IS BREED SPECIFIC LIABILITY APPROPRIATE?

The *Solesky* court noted that, over the past thirteen years, “there have been no less than seven instances of serious maulings by pit bulls upon Maryland residents resulting in either serious injury or death that have reached the appellate courts of this State”⁶¹ The majority of the court therefore found that the pit bull breed is inherently dangerous and imposed the strict liability standard.⁶² But is breed specific strict liability appropriate? None of the failed bills introduced by the Maryland legislature in the wake of

⁵⁷ RICHARD J. GILBERT & PAUL T. GILBERT, MARYLAND TORT LAW HANDBOOK § 11.4.1 (3d ed. 2012).

⁵⁸ *Id.*

⁵⁹ *See, e.g.,* *Schwier v. Gray*, 277 Md. 631, 634, 357 A.2d 100, 102 (1976); *Witriol v. Pfueller*, 247 Md. 177, 180, 230 A.2d 346, 347-48 (1967).

⁶⁰ *See, e.g.,* *Montgomery Cnty. v. Valk Mfg. Co.*, 317 Md. 185, 188, 562 A.2d 1246, 1247 (1989); *Sheehan v. Anthony Pools, a Div. of Anthony Indus., Inc.*, 50 Md. App. 614, 626, 440 A.2d 1085, 1092 (Md. Ct. Spec. App. 1982), *aff’d*, 295 Md. 285, 455 A.2d 434 (1983).

⁶¹ *Solesky*, 427 Md. at 630, 50 A.3d at 1076.

⁶² *Id.* at 642-52, 50 A.3d at 1083-89.

Solesky were breed specific.⁶³ However, over the last thirteen years, there have been not less than seven instances of severe maulings by pit bulls upon Maryland citizens.⁶⁴

Cases nationwide involving pit bull breeds, commonly certain terrier and bull breeds, address not only an aggressive propensity, but the ability to inflict devastatingly severe damage based on the size, build and apparent ‘killer’ instinct of pit bulls.⁶⁵ This alleged propensity has been cited in the vast majority of laws adopted involving them.⁶⁶ The neighboring jurisdiction of District of Columbia has adopted law involving pit bulls and states that the “temperament of pit bulls, particularly their volatile capacity for hostility and violent behavior, is sufficiently well-known that these dogs are ‘proper subject[s] of regulatory measures adopted in the exercise of a state’s police power’”⁶⁷ Prince George’s County, Maryland Code Section 3.185.01, adopted in 1996, prohibits owning, keeping or harboring Pit Bull Terriers. This law does not address cross-breeds. The Prince George’s County law is a prohibition against owning, keeping or harboring a Pit Bull Terrier.⁶⁸ It does not impose liability on any party. The law simply and succinctly prohibits keeping the dogs in the jurisdiction, with certain exceptions.⁶⁹ Violating this county law is a criminal offense flowing directly to the person owning, keeping or harboring the animal in the jurisdiction in violation of the law.

In Ohio, it was determined that pit bulls posed a serious danger to safety of citizens, such that the state and city had a legitimate interest in protecting citizens from the dangers posed by pit bull mixed breed dogs, as would support a finding that statutes and ordinances regulating pit bulls and defining them as vicious dogs were a legitimate exercise of that state’s and city’s police power under the Ohio Constitution.⁷⁰ Evidence showed that pit bulls that attacked were more likely to inflict severe damage than other breeds, and pit bulls had killed more Ohioans than any other breed, and city’s police officers fired weapons at pit bulls more often than at people and other breeds of dogs combined.⁷¹

⁶³ See *supra*, note 10.

⁶⁴ *Solesky*, 427 Md. at 630, 50 A.3d at 1076.

⁶⁵ See *Starkey v. Chester Twp.*, 628 F. Supp. 196, 197 (E.D. Pa. 1986); *Humphries v. Rice*, 600 So.2d 975, 977 (Ala. 1992); *American Canine Found. v. City of Aurora*, 618 F. Supp. 2d 1271, 1274-79 (D. Colo. 2009), *aff’d sub nom. Vianzon v. City of Aurora*, 377 Fed. Appx. 805 (10th Cir. 2010).

⁶⁶ *American Dog Owners Ass’n, Inc. v. Dade Cnty., Fla.*, 728 F. Supp. 1533, 1535 (S.D. Fla. 1989); MIAMI-DADE CNTY. ORDINANCE § 89-22 (1989).

⁶⁷ *McNeely v. U.S.*, 874 A.2d 371, 384 (D.C. 2005) (citing *McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978)); see also D.C. OFFICIAL CODE § 8-1906(b) (2010).

⁶⁸ PRINCE GEORGE’S CNTY., MD. CODE § 3.185.01 (Supp. 2010).

⁶⁹ *Id.*

⁷⁰ *Toledo v. Tellings*, 871 N.E.2d 1152, 1156-57 (Ohio 2007).

⁷¹ *Id.* at 1157.

The definition of a “vicious dog” in Ohio RC § 955.11(A)(4)(a) is a dog belonging “to the breed commonly known as a pit bull dog, even if such dog has not, without provocation, killed or caused injury to any person.”⁷² In a prosecution arising from a pit bull dog attacking and killing a child, the state presented sufficient evidence to show that the owner’s pit bull had the behavioral characteristics of a vicious dog where neighbors testified to numerous incidents of the dog frightening passersby as well as the neighbors, and the dog owner had bragged about his dog attacking another pit bull and killing a cat.⁷³

A 1984 article in the Cincinnati Enquirer Magazine described pit bulls:

The pit bull dog is a descendant of a cross between a bull dog and an Old English Smooth Terrier. Bred original to kill rats, the dog’s propensity for violence has been increased over the years by inbreeding. The pit bull dog is used illegally in many areas for fighting. A fight between two pit bull dogs resembles that of a cockfight. The dogs are placed in an enclosed arena, bets are made, and the dogs are let loose to fight one another until one is killed or until, and this is a rare occasion, one retreats. Breeders of pit bull dogs usually have to keep the dogs in separate pens because their vicious propensities would lead them to fight one another...

The pit bull dog has extremely strong shoulders, weighs between 40 and 80 pounds, and has muscles two inches thick on its lower jaws. When the dog bites, it locks on its victim with its back jaws, ripping and tearing its way through flesh and bone. It attacks without a bark or any warning, has a high threshold of pain, and usually will not quit the fight voluntarily. The injuries the dog can inflict upon a person or on another animal are most severe.⁷⁴

Considering what appears to be a stinging indictment of pit bulls nationwide and by the *Solesky* court majority, is breed specific strict liability appropriate in Maryland? Judge Greene, joined by Judges Harrell and Barbera wrote a lengthy dissent in the *Solesky* case.⁷⁵ The dissent argued, *inter alia*, that *Solesky*'s new rule was “grounded ultimately upon perceptions of a majority of this [court] about a particular breed of dog, rather than upon

⁷² State v. Ferguson, 603 N.E.2d 345, 347-48 (Ohio Ct. App. 1991).

⁷³ *Id.* at 349.

⁷⁴ Gregg Neal, *Pit Bull Dog Attack Litigation*, 33 AM. JUR. TRIALS 195, 203-04 (1986) (citing Lavoy, *Born to Kill*, CINCINNATI ENQUIRER MAGAZINE, Jan. 8, 1984, at 2).

⁷⁵ *Solesky*, 427 Md. at 653, 50 A.3d at 1090 (Greene, J., dissenting).

adjudicated facts showing that the responsible party possessed the requisite knowledge of the animal's inclination to do harm."⁷⁶ Those perceptions changed "a clear factual question into a legal one in an effort to create liability."⁷⁷ The dissent asserted that the transformation was particularly problematic given the disputed accuracy of dog bite statistics and the lack of expert testimony on pit bulls' allegedly inherent dangerousness.⁷⁸ In light of this conflicting evidence, the dissent concluded that "[t]he issues raised involving breed-specific regulation are not appropriate for judicial resolution; rather, those issues are best resolved by the Maryland General Assembly."⁷⁹ The dissent is correct, and based upon the bills filed thus far in the Maryland State Legislature, the answer is that breed specific liability is not appropriate in Maryland.

CONCLUSION

The *Solesky* decision has many unintended economic victims, including small businesses, the housing market, and cities and municipalities. It is practically impossible for third parties to determine a pure-breed from a cross-breed and, as such, inherently unfair and unnecessarily burdensome to impose strict liability on third parties. In addition, the *Solesky* decision does not appear to further any of the public policies associated with the implementation of a strict liability standard. The legislature should take steps to correct the adverse effects of this decision and reinstate the prior negligence standard.

⁷⁶ *Id.* at 654, 50 A.3d at 1090.

⁷⁷ *Id.*

⁷⁸ *Id.* at 654-55, 50 A.3d at 1090-91.

⁷⁹ *Id.* at 663, 50 A.3d at 1096.